

Exhibit 13

1 IN THE UNITED STATES DISTRICT COURT

2 FOR THE DISTRICT OF HAWAII

3
4 WAYNE BERRY, a Hawaii) CIVIL NO. CV03-00385 SOM LEK
citizen;) (Copyright)

5)
6 Plaintiff,)

7 vs.)

8) Volume 1

8 HAWAIIAN EXPRESS SERVICE,)
INC., a California)
9 corporation; et al.,)

10 Defendants.)
11)

12
13 DEPOSITION OF WAYNE BERRY,

14 taken on behalf of the Defendant, Post-Confirmation
15 Trust, at the Law Offices of Kobayashi, Sugita & Goda,
16 999 Bishop Street, Suite 2600, Honolulu, Hawaii,
17 96813, commencing at 8:59 a.m., on Wednesday, May 18,
18 2005, pursuant to Notice.

19
20 BEFORE: Julie A. Peterson, CSR #361, CRR, RMR
21 Registered Professional Reporter
22 Notary Public, State of Hawaii

23 Ali'i Court Reporting
24 2355 Ala Wai Blvd., Suite 306
Honolulu, Hawaii 96815
25 (808) 926-1719

1 APPEARANCES:

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4 For the Plaintiff: TIMOTHY J. HOGAN, ESQ.
5 Lynch Ichida Thompson Kim & Hirota
6 1132 Bishop Street, Suite 1405
7 Honolulu, Hawaii 96813

8 For the Defendant Post-Confirmation Trust:

9 LEX R. SMITH, ESQ.
10 ANNE E. LOPEZ, ESQ.
11 Kobayashi, Sugita & Goda
12 First Hawaiian Center
13 999 Bishop Street, Suite 2600
14 Honolulu, Hawaii 96813

15 and

16 ERIC C. LIEBELER, ESQ.
17 DAMIAN D. CAPOZZOLA, ESQ.
18 Kirkland & Ellis LLP
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21 For the Defendants Mark Dillon, Teresa Noa and Brian
22 Christensen, et al:

23 LYLE S. HOSODA, ESQ.
24 RAINA P.B. MEAD, ESQ.
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1 APPEARANCES: (cont'd)

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3 For the Defendants Hawaiian Express Service, Inc.,
4 H.E.S. Transportation Services, Inc., California
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10 For the Defendant Alix Partners, LLC:

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16 For the Defendants Guidance Software, Inc., and
17 Michael Gurzi:

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21 Also present: Martin G. Walker, Ph.D.

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22 Videographer: Justin Langlais
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1 materials available to you to determine any
2 differences that you could identify between FCS 1993
3 and the version or the database that Fleming was using
4 between April and early June of 2003, right?

5 MR. HOGAN: Objection, calls for speculation.
6 You can answer if you can. Assumes facts not in
7 evidence.

8 A Could you state that one more time?

9 MR. SMITH: Can you read it back, please?

10 (Record read as requested.)

11 MR. HOGAN: Same objection.

12 A I've studied the materials that are available
13 to me with that intent, to identify those, yes.

14 Q (By Mr. Smith): Okay. Would you take a look
15 at Exhibit 53, please, which is your affidavit?

16 A Look at what?

17 Q Page 14 of Exhibit 53.

18 A Okay.

19 Q Paragraph 31 makes a reference to Exhibit 27.
20 You wrote this paragraph 31?

21 A Yes.

22 Q And that truthfully describes how you created
23 Exhibit 27?

24 A Yes, it's a good characterization, yes.

25 Q Now, exhibit 27, is it correct that based on

1 the information available to you, you are only able to
2 identify seven fields that are in Original Logistics
3 Data.MDB that were not in FCS 1993?

4 A Okay. I had to think this through again. Ask
5 the question again.

6 Q Is it true --

7 A I'm sorry. It's late in the day.

8 Q Is it true that based on the information
9 available to you, you were only able to identify seven
10 fields that were in Original Logistics Data.MDB that
11 were not in FCS 1993?

12 A Yes, according to this analysis, I did, yes.

13 Q Any other changes that Dillon had made or that
14 had been made in the 2001 version that was produced to
15 you in discovery in the last case were out of Original
16 Logistics Data.MDB by the time you did this analysis,
17 right?

18 A I had just gone over to Auxiliary Logistics
19 Data.MDB.

20 Q We'll talk about that, but let's talk about
21 Original Logistics Data.MDB. They were out of -- Any
22 other changes that were in 2001 version that you had
23 looked at were out of Original Logistics Data.MDB?

24 A I think that question is a little bit different
25 than what you asked the first time.

1 The first one you're asking about, FCS
2 1993, comparing that to Original Logistics Data.MDB.

3 Q Correct.

4 A There were -- None of these existed, none of
5 these listings existed in FCS 1993.

6 Right?

7 Q Let's go back to my question. My question is:

8 As of the point that you did this study, except for
9 the seven fields that you've identified in Exhibit 27,
10 the other Dillon changes were out of Original
11 Logistics Data.MDB, right?

12 A No. Only the ones that we could identify in
13 this listing. Set out to identify, again, looking at
14 the original to the changes made in the 2001 stuff
15 that you turned over.

16 Q So based on your analysis, Original Logistic
17 Data.MDB was much closer to FCS 1993 than the 2001
18 version you had looked at prior to the last trial?

19 A It doesn't work like that with copyrights. It
20 either is or it isn't, and it wasn't.

21 Q I understand your legal position and I'm not
22 asking about that. All I'm asking is, there were far
23 fewer differences between FCS 1993 and Original
24 Logistics Data.MDB than there were between FCS 1993
25 and the November 2001 version?

1 A It's a yes or no question, and it was
2 different. That's the end of it.

3 Q It was different, but there were fewer
4 differences, weren't there?

5 MR. HOGAN: Objection as to "there were."
6 Talking about -- It's vague and ambiguous because at
7 the time there were two databases being run, both of
8 them illegal derivatives, and together they contained
9 all the things that were removed.

10 A It's not reasonable to talk about the degree of
11 differences between two pieces of software when you're
12 discussing a copyright. It's either the original or
13 it's not.

14 Q (By Mr. Smith): You were able to identify
15 seven differences between FCS 1993 and Original
16 Logistics Data.MDB, right?

17 A Yes.

18 Q That's all?

19 A I only needed one.

20 Q But that's the total you were able to identify
21 was seven, correct?

22 A This analysis, yes.

23 Q And what was the number, approximately, of
24 differences that you identified between FCS 1993 and
25 the 2001 version?

1 A What is it, about 58?

2 Q At least 50, right? Okay.

3 And some of the differences that you
4 identified between FCS 1993 and the 2001 version
5 involved entire tables, correct?

6 A I can't tell that from this report.

7 Q Okay. Now, you and your counsel have both made
8 reference to a database called Auxiliary Logistics
9 Data.MDB. Did you write anything or create anything
10 that's in Auxiliary Logistics Data.MDB?

11 A Again, I'd have to consult the copyright office
12 on that. It's a derivative of my work.

13 Q Did you create it? That's what I want to know.

14 A I'd have to ask the copyright office.

15 Q So you can't tell yourself whether you're the
16 creator or not of anything that's in Original
17 Logistics Data.MDB?

18 A No.

19 Q Did you actually sit at a computer and cause
20 any of the -- I'm sorry. I'm on the wrong one.

21 Did you sit at a computer and cause the
22 creation of any of the things that are in Auxiliary
23 Logistics Data.MDB?

24 A Did I physically sit at a computer and create
25 that?

1 STATE OF HAWAII)
2 CITY AND COUNTY OF HONOLULU) ss.

3 I, Julie A. Peterson, Notary Public, State of
4 Hawaii, do hereby certify:

5 That on May 18, 2005, commencing at 8:59 a.m.,
6 appeared before me Wayne Berry, the witness whose
7 deposition is contained herein; that prior to being
8 examined he was by me duly sworn; that the deposition
9 was taken in machine shorthand by me and thereafter
10 reduced to typewriting under my supervision; that the
11 foregoing represents, to the best of my ability, a
12 true and correct transcript of the proceedings had in
13 the foregoing matter.

14 That the deponent was notified through counsel,
15 by mail or by telephone, to appear and sign; that if
16 the transcript is filed without signature, deponent
17 has failed to appear and the transcript is therefore
18 kept on file without signature pursuant to Court
19 rules.

20 I further certify that I am not attorney for
21 any of the parties hereto, nor in any way interested
22 in the outcome of the cause named in the caption.

23 Dated at Honolulu, Hawaii, this 22nd day of
24 May, 2005.

25 My Commission Expires: 9/1/2006

NOTARY PUBLIC, STATE OF HAWAII

